IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 11, 2007 Session

STATE EX REL. ED CUNNINGHAM v. REAGAN FARR[1]

Appeal from the Chancery Court for Davidson County
No. 05-2756-IV Richard Dinkins, Chancellor

No. M2006-00676-COA-R3-CV - Filed on May 23, 2007

This appeal involves a dispute between a taxpayer and the Tennessee Department of Revenue regarding liability for sales and use and business taxes. The taxpayer originally filed suit in Blount County, but the case was transferred by agreement to the Chancery Court for Davidson County. Thereafter, the taxpayer filed an amended complaint seeking either a writ of mandamus to require the Commissioner of Revenue to make an assessment of the taxes owed or a declaratory judgment that no additional taxes were owed. The Commissioner moved to dismiss the amended complaint. The trial court granted the motion after concluding that it lacked subject matter jurisdiction to grant declaratory relief and that the taxpayer's mandamus claim was not yet ripe. The taxpayer appealed. While the appeal was pending, the Commissioner issued an assessment seeking $358,997.07 in taxes, penalties, and interest. We have determined that this case is now moot because the Commissioner has provided the taxpayer with the assessment it sought.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Michael H. Meares, Maryville, Tennessee, for the appellant, Ed Cunningham.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; and Brad H. Buchanan, Assistant Attorney General, for the appellee, Reagan Farr.

OPINION

I.

Ed and Melissa Cunningham operate Beds To Go, a furniture store located in Maryville, Tennessee. Between January 1, 2000, and May 31, 2003, Mr. Cunningham prepared and filed tax returns on behalf of Beds To Go but failed to remit to the State of Tennessee the full amount of the

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[1] Commissioner Reagan Farr has been substituted as a party in the place of Commissioner Loren Chumley in accordance with Tenn. R. App. P. 19(c).

sales and use and business taxes owed. When the Tennessee Department of Revenue ("Department") notified him that Beds To Go had not paid the proper amount of taxes, Mr. Cunningham filed amended tax returns and paid $162,224 in additional taxes.

Mr. Cunningham subsequently met with agents of the Department to ascertain whether Beds To Go owed any additional taxes. During these meetings, he insisted that the Department should assess him for any additional taxes. In May 2005, after the Department did not respond as quickly as he thought it should, Mr. Cunningham filed suit against the Commissioner of Revenue ("Commissioner") in the Chancery Court for Blount County, seeking an accounting, a tax refund, and declaratory relief. The case was transferred by agreement to the Chancery Court for Davidson County in November 2005. In January 2006, Mr. Cunningham filed an amended complaint seeking a writ of mandamus to compel the Commissioner to assess Beds To Go for the taxes it owed. In the alternative, he requested a declaratory judgment either that Beds To Go owed no taxes, penalties, and interest or that the Commissioner was barred from collecting them.

The Commissioner filed a motion to dismiss Mr. Cunningham's amended petition on the ground that the trial court lacked subject matter jurisdiction. The Commissioner asserted that the only avenues for judicial relief available to taxpayers like Beds To Go were either a suit for a refund of taxes already paid[2] or a suit to challenge the correctness of an assessment.[3] Because Beds To Go was not seeking a refund and because the Department had not yet issued an assessment, the Commissioner insisted that Beds To Go was not entitled to judicial relief of any kind. The Commissioner also argued that the trial court could not grant mandamus relief because decisions regarding the assessment of taxes are discretionary.

The trial court filed an order on February 21, 2006 dismissing Mr. Cunningham's amended complaint. The trial court concluded that it lacked subject matter jurisdiction with regard to the request for declaratory relief and that the petition for mandamus was premature because the three-year time frame in which the Commissioner is allowed to assess taxes[4] had not yet elapsed. Mr. Cunningham appealed.

On April 9, 2007, prior to the oral argument in this case, the Department presented Ms. Cunningham with a proposed audit assessment for Beds To Go.[5] The proposed assessment informed

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[2] Tenn. Code Ann. § 67-1-1801(a)(1)(A) (2006).

[3] Tenn. Code Ann. § 67-1-1801(a)(1)(B).

[4] Tenn. Code Ann. § 67-1-1501(b) (2006) grants the Commissioner three years to make an assessment of taxes, unless the Commissioner determines that the failure to pay taxes was intentional, in which case the Commissioner can make an assessment at any time.

[5] Ms. Cunningham is the owner of record of Beds to Go and, therefore, is liable for the payment of sales and use and business taxes. Apparently Mr. Cunningham prepared and signed the tax returns for the period involved in this dispute. The fact that he is not the taxpayer raises substantial question regarding his standing to bring this action. We will not address this issue, however, because the Commissioner has not raised it and because the record on this point is incomplete.

Ms. Cunningham that Beds To Go owed $333,014.04 in sales and use and business taxes, a one hundred percent civil fraud penalty, and a ten percent negligence penalty.[6] On May 8, 2007, the Department issued a final assessment informing Beds To Go and Ms. Cunningham that its final assessment amounted to $358,997.07 in taxes, penalties, and interest.[7]

II.

Before considering the issues raised by Mr. Cunningham, we must first address a threshold issue regarding the current justiciability of this appeal. The post-judgment facts that both parties have brought to our attention raise substantial questions regarding the efficacy of rendering a decision in this case. Even though the parties did not discuss justiciability in their briefs and did not file supplemental briefs in light of the post-judgment facts, we asked them to address the question of justiciability during oral argument. Accordingly, pursuant to Tenn. R. App. P. 13(b), we will address whether this appeal has been rendered moot by virtue of the Department's May 8, 2007 assessment.

Tennessee's courts do not have a constitutional limitation on their jurisdiction similar to the "case or controversy" requirement in Article III, Section 2 of the United States Constitution. They have, however, recognized justiciability doctrines similar to those developed by the United States Supreme Court to determine when courts should hear a case. 13 Charles A. Wright et al., *Federal Practice and Procedure* § 3529 (2d ed.1984); Barbara Kritchevsky, *Justiciability in Tennessee, Part One: Principles and Limits,* 15 Mem. St. U.L.Rev. 1, 3 n.5 (1984). These doctrines address not only the court's power to hear a case, but also the wisdom of doing so. *Renne v. Geary,* 501 U.S. 312, 316, 111 S. Ct. 2331, 2336 (1991); *Martin v. Washmaster Auto Ctr., Inc.,* No. 01A01-9305-CV-00224, 1993 WL 241315, at *1 (Tenn. Ct. App. July 2, 1993) (No Tenn. R. App. P. 11 application filed). In this way, they provide self-imposed rules that promote judicial restraint. 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 2.13(a), at 246-47 (4th ed. 2007) ("Rotunda & Nowak").

The courts, being careful stewards of their power, have developed various justiciability principles to serve as guidelines for determining whether providing judicial relief in a particular case is warranted. To be justiciable, a case must involve presently existing rights, live issues that are within a court's power to resolve, and parties who have a legally cognizable interest in the resolution of these issues. A case is not justiciable if it does not involve a genuine, existing controversy requiring the adjudication of presently existing rights. *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 193 (Tenn. 2000); *State ex rel. Lewis v. State*, 208 Tenn. 534, 537, 347 S.W.2d 47, 48 (1961); *Ford Consumer Fin. Co. v. Clay*, 984 S.W.2d 615, 616 (Tenn. Ct. App. 1998).

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[6] Mr. Cunningham filed a Tenn. R. App. P. 14 motion requesting this court to consider this document as a post-judgment fact. We hereby grant the motion.

[7] The Commissioner filed a Tenn. R. App. P. 14 motion requesting this court to consider this assessment as a post-judgment fact. We hereby grant the motion.

The requirements for litigation to continue are essentially the same as the requirements for litigation to begin. *Alliance for Native Am. Indian Rights in Tenn., Inc. v. Nicely*, 182 S.W.3d 333, 338 (Tenn. Ct. App. 2005). Thus, cases must remain justiciable throughout the entire course of the litigation, including the appeal. *State v. Ely*, 48 S.W.3d 710, 716 n.3 (Tenn. 2001); *Ford Consumer Fin. Co. v. Clay*, 984 S.W.2d 615, 616 (Tenn. Ct. App. 1998); 1 Rotunda & Nowak § 2.13, at 268-69. A moot case is one that has lost its justiciability because it no longer presents a present, live controversy. *McCanless v. Klein*, 182 Tenn. 631, 637, 188 S.W.2d 745, 747 (1945); *Hurd v. Flores*, ___ S.W.3d ___, ___, 2006 WL 1641520, at *13 (Tenn. Ct. App. 2006); *County of Shelby v. McWherter*, 936 S.W.2d 923, 931 (Tenn. Ct. App. 1996). Thus, a case will be considered moot if it no longer serves as a means to provide some sort of judicial relief to the prevailing party. *Knott v. Stewart County*, 185 Tenn. 623, 626, 207 S.W.2d 337, 338-39 (1948); *Ford Consumer Fin. Co. v. Clay*, 984 S.W.2d at 616; *Massengill v. Massengill*, 36 Tenn. App. 385, 388-89, 255 S.W.2d 1018, 1019 (1952).

Determining whether a case or an issue has become moot is a question of law. *Hurd v. Flores,* ___ S.W.3d at ___, 2006 WL 1641520, at *13; *Alliance for Native Am. Indian Rights in Tenn., Inc. v. Nicely*, 182 S.W.3d at 338-39. Thus, unless the case fits within one of the recognized exceptions to the mootness doctrine,[8] the courts will ordinarily vacate the judgment and remand the case to the trial court with directions that it be dismissed. *Ford Consumer Fin. Co. v. Clay*, 984 S.W.2d at 617; *McIntyre v. Traughber*, 884 S.W.2d at 138.

This litigation stemmed from Mr. Cunningham's desire to ascertain the full extent of Beds To Go's liability for sales and use and business taxes for the 2000-2003 time period. He sought to accomplish his goal by asking the courts to force the Department to issue an assessment or, in the alternative, to declare that Beds To Go owes no tax. The Department has now issued the assessment that Mr. Cunningham sought.[9] As a result of this assessment, Beds To Go now has a clear avenue pursuant to Tenn. Code Ann. § 67-1-1801(a)(1)(B) to obtain judicial review of the correctness and validity of the assessment and to raise the other issues it seeks to raise pursuant to Tenn. Code Ann. § 67-1-110 (2006).

III.

Based on our review of the record, we have concluded that this appeal is moot and that it does not fit within one of the recognized exceptions to the mootness doctrine. Beds To Go has the

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[8] The courts have recognized several exceptions to the mootness doctrine. Exercising their discretion, *McIntyre v. Traughber*, 884 S.W.2d 134, 137 (Tenn. Ct. App. 1994); *Dockery v. Dockery*, 559 S.W.2d 952, 955 (Tenn. Ct. App. 1977), they have declined to dismiss cases when the issue involves important public interests, when the issue is important to the administration of justice, and when an issue is capable of repetition but will evade judicial review. *State ex rel Anglin v. Mitchell*, 596 S.W.2d 779, 782 (Tenn. 1980); *New Riviera Arts Theatre v. State*, 219 Tenn. 652, 658, 412 S.W.2d 890, 893 (1967); *LaRouche v. Crowell*, 709 S.W.2d 585, 587-88 (Tenn. Ct. App. 1985).

[9] It has not escaped our notice (1) that this dispute involves tax liability that is between four and seven years old, (2) that this litigation has been pending for two years, (3) that the Department issued its proposed assessment within six days after the case was set for oral argument, and (4) that the Department issued its final assessment just three days before oral argument. These circumstances, however, do not affect our conclusion that this appeal is moot.

assessment that Mr. Cunningham has been seeking for the past two years. Accordingly, we vacate the February 21, 2006 order and remand the case to the trial court for the purpose of entering an order dismissing Mr. Cunningham's petition on the grounds of mootness. We tax the costs of this appeal in equal proportions to Ed Cunningham and his surety and to the Commissioner of Revenue.

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WILLIAM C. KOCH, JR., P.J., M.S.